Supreme Court, U.S.
FILED
SEP 29 2003
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No. 03-313

In The
Supreme Court of the United States

STRATA HEIGHTS INTERNATIONAL CORPORATION, STRATA ENERGY RESOURCES CORPORATION, and HEIGHTS ENERGY CORPORATION,

Petitioners,

v.

PETRÓLEO BRASILEIRO, S.A.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a contract between United States corporations and a foreign corporation there is a forum selection clause that mandates that disputes concerning or relating to the contract be resolved in arbitration in a foreign country. The contract has a survivability clause that does not provide for the extension of the forum selection clause. After the termination of the contract, does the forum selection clause govern every other subsequent contract or tortious act between those entities?

2. What is a Court of Appeals' proper standard of review over a district court's order on a motion to dismiss due to a forum selection clause?

3. What is the proper procedural vehicle to raise a forum selection clause issue?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, the following name is added to the list of parties to the proceeding appearing at page ii of the Petition for Writ of Certiorari:

Republic of Brazil (the Federal Government of Brazil owns 55.71% of the shares of voting capital in Defendant/Respondent Petróleo Brasileiro, S.A). (R. at 392.)

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STATEMENT OF THE CASE

Summary of the Argument

This case involves nothing more than the straightforward application of a forum selection clause requiring that all disputes relating to agreements between the parties about the development of oilfield projects in Brazil be resolved by arbitration in Brazil. That clause provides as follows:

> Any dispute, controversy or claim arising out of or relating to this [Memorandum of Understanding] or the breach, termination or invalidity hereof, which cannot be settled amicably between the parties, shall be settled by arbitration to be conducted in Rio de Janeiro in the Portuguese language. . . .

(R. at 116.) As the United States Court of Appeals for the Fifth Circuit said, the case turns on "the interpretation of unambiguous contract language." (Joint Appendix at 20a.)

As explained in more detail below, this Court should deny the petition for writ of certiorari because: (1) the first Question Presented is a fact-bound matter of contract interpretation; (2) contrary to Petitioners' suggestion, Respondent actually invoked the forum selection clause under the rule that Petitioners say is the proper method for invoking a forum selection clause; (3) Petitioners failed to preserve error on the second and third Questions Presented; (4) under any test or any standard, there is no reason to think this forum selection clause would not be enforced; and (5) the opinion by the Fifth Circuit is unpublished and is not binding precedent on any court. Accordingly, the petition for writ of certiorari should be denied.

Statement of Facts

Petitioners Strata Heights International Corporation, Strata Energy Resources Corporation, and Heights Energy Corporation (collectively "Strata") are American companies that sought to do business in Brazil with the Brazilian national oil company, Respondent Petróleo Brasileiro, S.A. ("Petrobrás"), for the development of oil fields in Brazil. Strata and Petrobrás undertook extensive negotiations in Brazil for the development of Brazilian oilfields, and Strata's representatives traveled repeatedly to Brazil to conduct those negotiations.

As part of efforts to obtain rights to develop oilfields in Brazil, Strata executed a Memorandum of Understanding ("MOU") with Petrobrás, which addressed potential opportunities for joint ventures in Brazil. (R. at 120-14.) The MOU contained the forum selection clause set out above, which unequivocally required disputes arising out of or relating to the MOU to be arbitrated in Brazil in Portuguese. (R. at 116.) Strata also executed an Agreement for Technical Assessment ("ATA"), which allowed it to purchase technical information for $20,000.00 in order to determine whether to continue bidding for development rights. (R. at 113-98.) The ATA adopted terms of the MOU that were not expressly excluded and thus incorporated the forum selection clause requiring arbitration of any disputes in Brazil. (R. at 111.) Given that the forum selection clause was incorporated into the ATA, and given that substantial portions of the damages for which Strata sued were allegedly incurred while the MOU was in effect (*E.g.*, R. at 202-197), Strata's statements to this Court that the forum selection clause was part of "a contract that was not the subject of the litigation" (Pet. at 2) is misleading. Strata's first Question Presented, Statement of the Case,

and Statement of Facts also fail to mention that the ATA incorporated the forum selection clause. (Pet. at i, 2-5.)[1]

The transactions Strata sought to consummate with Petrobrás ultimately were not completed because of certain provisions of Brazilian law. Dissatisfied with that result, Strata brought suit in federal district court in Houston, Texas, rather than abide by the forum selection clause. Strata asserted half of its claims under Brazilian law.

Petrobrás moved to dismiss for lack of subject matter jurisdiction based on the Foreign Sovereign Immunities Act, lack of personal jurisdiction, improper venue because of the forum selection clause, and forum non conveniens. In addition to invoking Rule 12(b)(3) to assert the forum selection clause, Petrobrás asked the District Court, in the

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[1] Strata also represents to the Court that the parties "entered into" an oil and gas joint development agreement. (Pet. at 2.) That is not true. The only agreements the parties ever entered were the MOU and the ATA. Similarly, Strata's persistent references to the Heads of Agreement ("HOA"), to Strata's supposed decision not to "enforce their rights under the HOA," and to Strata's alleged claim for "breach of HOA" are baffling. (Pet. at 4-5, 9.) The HOA was never executed by Petrobrás. Even if it had been executed, it would still be unenforceable: it explicitly states that it was "not a binding agreement" and that the parties could withdraw from it "for any reason without any claim against any other party." (R. at 390-83.) Likewise, Strata's claim that "Petrobrás testified that it ordinarily placed a forum selection clause into HOA agreements" (Pet. at 9) is misguided for two reasons. First, it misstates the evidence: A Petrobrás attorney provided an affidavit stating that Petrobrás included forum selection clauses in "*binding agreements*" (R. at 497), that is, in final agreements actually consummating transactions – not in "HOA agreements," which, again are explicitly non-binding. Second, it is undisputed that Petrobrás did insist on forum selection clauses in final agreements. (R. at 497.)

alternative, to "enforce the forum selection clause and dismiss under Rule 12(b)(1), Rule 12(b)(6), 28 U.S.C. § 1406(a), or . . . for forum non conveniens." (R. at 126 n.10.) The Magistrate Judge recommended that Petrobrás' motions be denied, and the District Judge adopted the Magistrate Judge's Memorandum and Recommendation. While the Magistrate Judge concluded that the dispute did not "arise under" the MOU and the ATA and while the District Judge adopted the recommendation, neither judge considered whether the dispute at issue "relates to" the agreements containing and adopting the forum selection clause, and thus denied Petrobrás' motion to dismiss.

In an unpublished opinion, the Fifth Circuit reversed the District Court's decision based on the forum selection clause. The Fifth Circuit explained that the forum selection clause is not limited merely to disputes that "arise out of" the MOU but also encompasses disputes "relating to" the MOU such that "if Strata's causes of action relate to the MOU or the ATA, we must reverse the district court and order that it dismiss Strata's suit on remand." (Joint Appendix at 15a.) The Fifth Circuit then methodically set out how the parties' agreements interlocked, explained why this dispute is related to those agreements (Joint Appendix at 16a-18a), and concluded that the forum selection clause must be enforced:

> The district court determined that Strata's claims did not arise under the MOU, and thus declined to dismiss the suit. . . . We do not resolve whether the claims arise out of the MOU or ATA because we find the claims relate to those agreements.
>
> . . . .

> The district court erred . . . by failing to enforce the broad forum selection clause contained in the MOU requiring all disputed [sic] related to that document to be arbitrated in Brazil. In light of the interrelationship of the MOU, ATA, and HOA, we cannot say that Strata's claims under the HOA do not relate to the MOU or ATA. Accordingly, we vacate the order of the district court and remand the case with orders that the cause be dismissed.

(Joint Appendix at 14a-15a, 22a.)[2] The Fifth Circuit reached this conclusion as a matter of "interpretation of unambiguous contract language." (Joint Appendix at 20a.) The Fifth Circuit denied Strata's request for panel rehearing.

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[2] Strata's characterization of the Fifth Circuit's ruling is inaccurate. Strata asserts the Fifth Circuit "broadly determined that the forum selection clause in *the terminated confidentiality agreement*" required dismissal, completely ignoring the fact that the ATA incorporated the forum selection clause. (Pet. at 2 (emphasis added).) Likewise, Strata's contention that the "only evidence that the three agreements were related is conclusory statements made by Petrobrás in its brief on appeal" is simply untenable. (Pet. at 13.) As explained by the Fifth Circuit, the relationship among the agreements is apparent from the faces of the agreements, and the agreements' relationship to this dispute is equally apparent. Strata sought substantial damages that allegedly accrued while the MOU was in effect (*E.g.*, R. at 202-197); that belies Strata's representation to this Court that "Strata's claims in this suit arose solely after the termination of the MOU." (Pet. at 9.) Moreover, when Strata sought to buttress another argument by listing various elements of its damages in its Brief to the Fifth Circuit, the very first element Strata listed was the $20,000.00 payment it made under the ATA. (Brief of Appellees at 18-20.)

REASONS THE PETITION SHOULD BE DENIED

Strata has presented no compelling reason for this Court to grant Strata's petition for writ of certiorari. (Sup. Ct. R. 10.) In fact, Strata's arguments reveal the fact that Strata simply disagrees with the Fifth Circuit's review of the facts and its conclusion that the forum selection clause must be enforced. (*E.g.*, Pet. at 14 ("[T]he Court of Appeals . . . ignored the contracts and facts. . . .").) Conceding that the District Court's ruling "was a fact intensive determination" and "necessarily involved the facts of this case" and apparently recognizing that its first Question Presented (whether the forum selection clause should be enforced) is entirely fact-bound, Strata seeks to remake that issue into procedural and standard-of-review questions. (*Id.* at 14.) At bottom, Strata's petition is nothing more than an expression of disappointment with the Fifth Circuit's interpretation of the agreements at issue and a plea to have this Court revisit the facts. Strata's petition therefore should be denied.

1. Strata's first Question Presented is simply a fact-bound dispute of contract interpretation.

The first question that Strata presents for review is nothing more than a factual skirmish. The Fifth Circuit concluded that the forum selection clause survived and applies to this dispute, and Strata disagrees. There is no conflict of authority among the Courts of Appeals, no important federal question in conflict with a decision by a state court of last resort, no overarching legal principle, nor any other reason to warrant review by this Court. (*See* Sup. Ct. R. 10; *cf. id.* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly

stated rule of law.").) Strata's quibble over the facts would have little, if any, application beyond this case. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). There simply is no reason for the Court to revisit this question.

2. Petrobrás actually invoked the rule that Strata tells this Court Petrobrás should have invoked.

Perhaps aware that the first Question Presented amounts to no more than a factual dispute, Strata tries to transform that issue into questions over how a forum selection clause should be raised and how an appellate court should review a decision on a forum selection clause. Strata argues that Petrobrás should have invoked the forum selection clause under Rule 12(b)(6) and not under Rule 12(b)(3): "That issue should have been raised in either a Rule 12(b)(6) motion or a motion for summary judgment." (Pet. at 12.)

In fact, Petrobrás actually *did* raise the forum selection clause under Rule 12(b)(6). (R. at 126 n.10.) While Petrobrás asserted that venue was improper because of the forum selection clause, that was only one of five avenues Petrobrás took to invoke the forum selection clause. Because a previous Fifth Circuit case had expressly noted the "'enigmatic question of whether motions to dismiss on the basis of forum selection clauses are properly brought as motions under Fed. R. Civ. P. 12(b)(1), 12(b)(3), or 12(b)(6), or 28 U.S.C. § 1406(a),'" Petrobrás asked the District Court to "enforce the forum selection clause and dismiss under Rule 12(b)(1), *Rule 12(b)(6)*, 28 U.S.C. § 1406(a), or . . . for forum non conveniens." (R. at

126 n.10 (quoting *Haynsworth v. Corporation*, 121 F.3d 956, 961 (5th Cir. 1997)) (emphasis added).)

Strata fails to mention that in its petition to this Court, leaving the Court with the impression that Petrobrás moved solely under Rule 12(b)(3). Worse yet, when Strata finally raised this issue with the Fifth Circuit (for the first time in its Motion for Rehearing), it flatly misstated what Petrobrás actually had done to enforce the forum selection clause: "Petrobrás *solely* raised the forum selection clause issue in a motion to dismiss for improper venue. . . ." (Motion for Rehearing at 3 (emphasis added).) That is simply false. Because Petrobrás actually invoked the rule that Strata curiously tells this Court should have been invoked, there is no need for this Court to consider this question. *See Rainforest Café, Inc. v. EklecCo, L.L.C.*, 340 F.3d 544, 545 n.5 (8th Cir. 2003) (declining to address whether a forum selection clause should be raised under Rule 12(b)(3) or 12(b)(6) since the defendant moved for dismissal under both subsections).

3. Strata failed to preserve error on two of its three Questions Presented.

Even if Petrobrás had not also invoked the forum selection clause under Rule 12(b)(6), Strata's petition should be denied because Strata failed adequately to raise and press these issues in the courts below and because the courts below did not pass on them.

The general rule is that this Court will not grant certiorari when the issues presented for review were not raised in the lower courts. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this

Court will not ordinarily consider them." (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."). Given that the second and third questions were neither adequately raised before nor considered by the Fifth Circuit, this Court should deny Strata's attempt to advance them in this Court.

A. Strata did not contest the manner in which Petrobrás invoked the forum selection clause.

Strata waited until petitioning the Fifth Circuit for rehearing to complain about the manner in which Petrobrás invoked the forum selection clause. In the extensive briefing done before the Magistrate Judge, the District Court, and the Fifth Circuit (until Strata sought rehearing), Strata never once complained that Petrobrás' invoking the forum selection clause under a Rule 12(b)(3) motion to dismiss for improper venue was somehow deficient. Instead, Strata addressed the forum selection clause as a venue question in opposing Petrobrás' motion to dismiss. (R. at 258-52.) Strata never claimed Petrobrás had invoked the wrong rule; in its principal brief to the Fifth Circuit, Strata said only:

> This Court has held that it reviews determinations regarding the enforceability of forum selection clauses *de novo*. However, there is precedent

> that forum selection clause determinations should be reviewed under an abuse of discretion standard of review and as such should be raised under a Rule 12(b)(3) motion. *Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1174 (9th Cir. 2002).[3] In any event, where the applicability of a forum selection clause depends upon disputed fact issues, those factual determinations should be reviewed under a clear error standard of review.

(Brief of Appellees at 58-59 (first citation omitted).) Beyond that, Strata said nothing about how a forum selection clause should be raised.

Such an oblique reference to a different procedural mechanism is hardly sufficient to put Petrobrás or the Fifth Circuit (let alone the Magistrate and District Judges) on notice that Strata intended to challenge the form in which Petrobrás asserted the forum selection clause. Indeed, among the eight issues Strata presented for review by the Fifth Circuit, there is no mention that Petrobrás should have invoked a different procedural mechanism for raising the forum selection issue. (Brief of Appellees at 2-6.) The Fifth Circuit certainly did not pass on this question in its primary opinion, and it never so much as mentioned Rule 12(b)(3), let alone that there was any controversy as to how Petrobrás raised the forum selection clause.

It was not until Strata moved for rehearing in the Fifth Circuit – more than two years after Petrobrás first

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[3] A petition for writ of certiorari has since been filed in that case. *See* 71 U.S.L.W. 3400 (U.S. Nov. 22, 2002) (No. 02-813).

invoked the forum selection clause – that Strata complained Petrobrás should have invoked a different rule.[4] And then, as explained above, Strata did not accurately represent what Petrobrás had done to raise the forum selection clause. It is thus clear that Strata failed properly to raise this issue in the courts below, but now, years later, Strata would have Petrobrás penalized for supposedly failing to meet a standard that Strata never attempted to invoke. Even if Petrobrás had not moved under Rule 12(b)(6) along with Rule 12(b)(3), because Strata failed adequately to raise this issue in the courts below, Strata waived it and should not be allowed to assert it for the first time in seeking certiorari in this Court.

B. Strata did not ask the Fifth Circuit to apply a different standard of review.

Strata also failed to inform the Fifth Circuit that it ought to employ a different standard of review in passing on the forum selection clause. At most, Strata merely *hinted*, or, at most implied, that some other standard of review might be appropriate by observing that "there is precedent" from another circuit for using an abuse of discretion standard. (Brief of Appellees at 58-59.) Strata never directly asked the Fifth Circuit to apply a different standard (only mentioning the Ninth Circuit's practice), never offered the slightest explanation of why a different

[4] As in its principal opinion, the Fifth Circuit did not discuss this issue in its order denying Strata's motion for rehearing.

standard of review should apply, and never suggested why that would yield a different result in this case.[5]

Even in its Motion for Rehearing, Strata still did not provide any further explanation of this issue. While Strata challenged other aspects of the Fifth Circuit's ruling on the forum selection clause, Strata once again failed to suggest that a different standard of review should apply. Even assuming that raising an issue for the first time in seeking rehearing is sufficient to preserve error, Strata failed

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[5] Strata also overstates its argument that there is a conflict in the courts of appeals regarding the standard of review applicable to determinations on forum selection clauses. Even as set out by Strata, the majority of circuits have held that the standard is *de novo*, and this clearly is the better rule. *See, e.g.*, 15 Charles Alan Wright et al., *Federal Practice & Procedure* § 3803.1 (2d ed. Supp. 2003) ("Some courts of appeals have held that the enforceability of a forum-selection clause is reviewed for abuse of discretion. But many recent cases have held – correctly it would seem – that this is a question of law so that the district court's decision is reviewable de novo.") (footnote omitted). The only two cases that Strata cites as applying an abuse of discretion standard are from the Eighth and Ninth Circuits, both of which have limited the application of an abuse of discretion standard.

The Eighth Circuit has held that "de novo review is the appropriate standard for reviewing a district court's interpretation of the specific terms contained in the forum selection clause," and has noted that the "Ninth Circuit itself has refined its approach and has explained that it employs de novo review when a district court is required to interpret the language of a forum selection clause." *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 691-92 (8th Cir. 1997). Similarly, the Ninth Circuit has noted that "whether the parties agreed to a forum selection clause is a question of law that we review de novo." *Chateau des Charmes Wines Ltd. v. Sabate USA, Inc.*, 328 F.3d 528, 530 (9th Cir. 2003). Given that Strata complains about "whether the forum selection clause in the MOU was *intended by the parties* to control all future agreements or actions between them" (Pet. at 13 (emphasis added)), it appears that even the Eighth and Ninth Circuits would employ a *de novo* standard of review in this case.

expressly to ask the Fifth Circuit to use a different standard and should be held to have waived this issue.

4. Even under the rules that Strata espouses, the forum selection clause would be enforced.

Even if the Court accepts Strata's arguments that Petrobrás invoked the wrong rule to raise the forum selection clause and that the Fifth Circuit then applied the wrong standard of review, there is no indication that either argument would make a difference to the outcome of this dispute.

A. The Fifth Circuit likely would reach the same conclusion under a different standard of review.

Applying the standard of review Strata promotes would have no impact on the Fifth Circuit's clear and unequivocal decision. As set out above, the Fifth Circuit easily concluded, as a matter of "the interpretation of unambiguous contract language," that the dispute relates to the agreements containing and adopting the forum selection clause. (Joint Appendix at 15a, 20a). As repeatedly stressed by Petrobrás both in its objections to the Magistrate Judge's Memorandum & Recommendation and in its briefs to the Fifth Circuit, the District Court and the Magistrate Judge failed to consider the second prong of the forum selection clause ("arising out of *or relating to*"), instead merely addressing whether the parties' dispute "arose out of" the operative documents. (*See, e.g.*, Brief of Appellant at 13-14, 43-45; R. at 536, 513-09.) The Fifth Circuit squarely accepted Petrobrás' argument, concluded that the District Court erred "by failing to enforce the

broad forum selection clause," and reversed accordingly. (Joint Appendix at 14a-15a.)

Strata has failed to suggest why it would not be an abuse of discretion simply to ignore half of a forum selection clause. *Cf. In re Sealed Appellant*, 194 F.3d 666, 670 (5th Cir. 1999) ("A district court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence."). Indeed, there is no reason to think that, when a trial court wholly fails to consider half of an applicable standard, the result would be any different under an abuse-of-discretion standard than under a *de novo* standard.

It thus appears that the Fifth Circuit, under either a *de novo* standard or an abuse of discretion standard, would have found that the lower courts erred in disregarding the plain language in the agreements requiring arbitration in Brazil. The Fifth Circuit simply reversed the District Court for failing to consider the express language in the contract. It was clear to the Fifth Circuit that "the outcome of this appeal depends entirely on the interpretation of unambiguous contract language." (Joint Appendix at 20a.)[6]

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[6] This Court has long held that forum selection clauses are presumptively valid and, absent exceptional circumstances, should be enforced. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 19-20 (1972); *see also Haynsworth v. Corporation*, 121 F.3d 956, 962 (5th Cir. 1997) (noting this Court's holding in *The Bremen* "that federal courts presumptively must enforce forum selection clauses in international transactions" and noting that since this Court's decision in *The Bremen*, this Court "has enforced every forum selection clause in an international contract that has come before it").

B. Even if Strata had timely complained that Rule 12(b)(3) was not the means by which to assert a forum selection clause, that is the better practice.

Strata's position that a party cannot raise a forum selection clause by a Rule 12(b)(3) motion clearly is the minority view. One leading commentator has observed that, even though courts are split on which 12(b) motion should be used where a forum selection clause makes a particular state or foreign court the exclusive forum, the position that a Rule 12(b)(6) motion to dismiss is better (as Strata asserts here) is the "minority view" and has been "correctly criticized" on several grounds. *See* 17 James Wm. Moore, *Moore's Federal Practice* § 111.04[3][b][ii] (3d ed. 2003). The prevailing view is that a Rule 12(b)(3) motion is the correct way to raise a forum selection clause. And regardless of which rule is invoked (or whether, as here, both are invoked), the "result . . . is almost certain enforcement of the clause through dismissal or remand, regardless of the means used to raise the issue." *Id.* § 111.04[3][a].

At the end of the day, Petrobrás invoked the correct rules, and the Fifth Circuit correctly applied the proper standard of review. There is no reason to think that, even if Strata had timely raised the issues it now asserts, the result would be otherwise. Moreover, Strata is decidedly *not* left without any avenue of relief. Strata still has the remedy to which it agreed – arbitration in Brazil.

5. The Fifth Circuit's opinion is unpublished and of little precedential value.

Because the Fifth Circuit's opinion is unpublished, it will have little impact beyond this case. (Joint Appendix at 4a.) Under Fifth Circuit Local Rule 47.5.4, unpublished opinions are only persuasive – not precedential. (5th Cir. R. 47.5.4. ("Unpublished opinions issued on or after January 1, 1996, are not precedent. . . . An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited. . . .").) Thus, even if this Court disagrees with the Fifth Circuit's disposition of the forum selection clause, there is no need for the Court to correct that decision for purposes of future decisions.

CONCLUSION

This case presents no issue worthy of the Court's attention, and the Fifth Circuit's decision to enforce the forum selection clause was correct. The petition for writ of certiorari should be denied.

Respectfully submitted,

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